In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1226

HYMAN C. SLEPICOFF, DBA GRADUATE ENTERPRISES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 524 F.2d 1244.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1975. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on January 29, 1976. The petition for a writ of certiorari was filed on February 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction should be reversed because the grand jury may have measured petitioner's

conduct in light of the obscenity standards set forth in *Miller* v. *California*, 413 U.S. 15, although that conduct occurred prior to the decision in *Miller*.

2. Whether petitioner was entitled to an acquittal because the government's expert witness allegedly agreed that the materials at issue were not utterly without redeeming social value.

3. Whether the trial court erred in instructing the jury that it could consider the prurient appeal of the materials to sexually deviant groups.

4. Whether petitioner was entitled to introduce evidence of good faith in mailing the materials.

5. Whether the jury should have been instructed that the State of Florida's obscenity statute had been held unconstitutional prior to the time of petitioner's conduct.

6. Whether 18 U.S.C. 1461 is unconstitutional.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on three counts of mailing obscene advertisements, in violation of 18 U.S.C. 1461.[1] He was sentenced to concurrent terms of eighteen months' imprisonment, with twelve months of the sentence suspended, to be followed by three years' probation. Petitioner was also fined $5,000 on each count. The court of appeals affirmed (Pet. App. A).

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[1]The indictment contained nine counts charging petitioner with mailing obscene films, photographs and advertisements. One count was dismissed prior to trial, and petitioner was found not guilty on four counts. Petitioner's motion for a new trial was granted on one of the four remaining counts on which he had been found guilty.

BLEED THROUGH

The government's evidence showed that petitioner operated Graduate Enterprises in Canoga Park, California. In April 1973, he mailed unsolicited advertisements to Kendell Wherry, an Assistant United States Attorney, in Orlando, Florida (Tr. 30-33, 56). In May 1973, petitioner mailed advertisements addressed to Philip Jamison in Lake Monroe, Florida (Tr. 94-95). Jamison was the ficticious name used by a postal inspector who made test purchases from petitioner (Tr. 109-110).

The advertisements mailed by petitioner were introduced at trial. They depicted, *inter alia,* copulation, homosexual acts, masturbation, sodomy, fellatio, beastiality, masochism, and sadomasochism. Other subjects noted in the advertisements include pedophelia, erotic cannibalism, and necrosadism.

Dr. Michael Gutman, a psychiatrist, testified for the government that the materials appealed to prurient interests and were utterly without redeeming social value (Tr. 329-330). Experts who testified for petitioner contradicted these conclusions (Tr. 443-444, 516-518, 593, 603-604, 657).

The jury was instructed that the materials could be found obscene only if they were found (1) to appeal to a prurient interest under contemporary community standards, (2) to be patently offensive to contemporary community standards, and (3) to be utterly without redeeming social value (Tr. 932). The court further instructed the jury that the prurient appeal of the material was to be measured by its appeal to the average adult, but could also be assessed in terms of a clearly defined sexually deviant group, such as homosexuals (Tr. 934).

ARGUMENT

1. In a pretrial motion to dismiss the indictment, which was denied (M. Tr. 2-5),[2] petitioner claimed that

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[2]"M. Tr." refers to the transcript of the hearing on pretrial motions, including the motion at issue here.

the indictment was returned under the standard of *Miller* v. *California*, 413 U.S. 15. He bases that claim on an affidavit submitted by petitioner's counsel, in which counsel stated that he had learned from the prosecutor that portions of *Miller* and *Hamling* v. *United States*, 418 U.S. 87, had been read to the grand jury.[3] Petitioner contends (Pet. 17-20) that the indictment was invalid because the conduct for which he was indicted occurred prior to the decisions in either *Miller* or *Hamling*. As the court of appeals correctly held (Pet. App. 3), this claim is not meritorious.

Although the courts below assumed, *arguendo*, that the grand jury returned the indictment under *Miller* standards, that has not been established as a matter of fact. Petitioner's counsel states merely that portions of *Miller* and *Hamling* were read to the grand jury. It does not necessarily follow, however, that the grand jury considered only the *Miller* standards in returning the indictment. Such speculation is not a proper basis for invalidating the indictment.

In any event, the indictment is valid on its face and is not open to challenge on the ground petitioner raises. *Costello* v. *United States*, 350 U.S. 359, 361-364; *Lawn* v. *United States*, 355 U.S. 339, 349; *United States* v. *Calandra*, 414 U.S. 338, 345. In *Costello*, the Court determined that an indictment was valid even though supported entirely by hearsay. The Court held, citing *Holt* v. *United States*, 218 U.S. 245 (indictment supported in large part by incompetent evidence), that "[a]n indictment returned by a legally constituted and unbiased grand jury * * *, if valid on its face, is enough to call for trial of the charge on the merits" (350 U.S. at 363).

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[3]The portions of the grand jury proceedings pertinent to this point were not recorded.

Similarly, the indictment here is sufficient to call for a trial on the merits, in which petitioner's interests are safeguarded by a requirement of "strict observance of all the rules designed to bring about a fair verdict" (350 U.S. at 364). The indictment charged the offenses in the language of the statute and was otherwise specific as to time and place of the violations. At trial, the jury was instructed in conformity with *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413, [4] and petitioner was convicted under that standard. Under these circumstances, "[n]either justice nor the concept of a fair trial" (350 U.S. at 364) requires opening the indictment to challenges of the kind petitioner advances.[5]

2. Petitioner contends (Pet. 20-22) that his conviction is invalid because the government's expert witness allegedly agreed that the materials here were not utterly without redeeming social value. But the government's witness, Dr. Gutman, testified that the materials were utterly without redeeming social value (Tr. 329-330), and Dr. Gutman did not withdraw this opinion. Admittedly, Dr. Gutman denied that the materials had no value whatsoever, on the ground that such materials appeal to prurient interest

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[4]There is thus no reason to hold this case pending a decision in *Marks* v. *United States*, No. 75-708, certiorari granted March 1, 1976, which presents the question, *inter alia*, of whether the standards set forth in *Miller* may be applied at trial to pre-*Miller* conduct. As this Court's cases (cited above) suggest, the history and function of the grand jury distinguishes the issue in this case from the analogous issue raised in *Marks* in the context of trial.

[5]There is no basis for a claim that the grand jury was biased in this case. A claim of prosecutorial bad faith would be equally groundless. The cases cited by petitioner (Pet. 18), which bar the application at trial of *Miller* standards to pre-*Miller* conduct, were decided after the return of the indictment.

and therefore might aid temporarily in the treatment of impotency (Tr. 335-336). He observed, however, that in the long run use of the materials would be counterproductive and ineffectual (Tr. 336). Dr. Gutman concluded that the materials would be of little or no value, and in fact harmful, if used in an uncontrolled context (Tr. 353).

Under Dr. Gutman's theory, nothing could ever be obscene, since he views appeal to prurient interest as itself having social value. The materials were introduced at trial and are themselves a sufficient basis for the jury's verdict. As the Court has said on several occasions (*Hamling* v. *United States, supra,* 418 U.S. at 100; see *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56; *Ginzburg* v. *United States,* 383 U.S. 463, 465): "Expert testimony is not necessary to enable the jury to judge the obscenity of material which * * * has been placed into evidence."

3. Petitioner contends (Pet. 22-24) that the trial court erred in instructing the jury (Tr. 934) that prurient appeal may be assessed not only by average adult standards, but also by the standards of a clearly defined sexually deviant group. A similar instruction was approved in both *Hamling* v. *United States, supra,* 418 U.S. at 128-130, and *Mishkin* v. *New York,* 383 U.S. 502, 508-509. The trial judge was justified in this case in concluding that some of the materials dealt with sexual deviancy and that the instruction was therefore warranted.

Petitioner nevertheless argues that the instruction was unforeseeable, and that he could have offered expert testimony had he known that the instruction would be given. But *Mishkin* was decided more than eight years prior to petitioner's trial, and *Hamling,* six months before the trial. In view of the nature of the materials at issue, the instruction approved in those cases was foreseeable.

BLEED THROUGH

Petitioner also argues that before such an instruction was proper the government was required to introduce expert testimony showing appeal to the prurient interest of sexually deviant groups. Petitioner relies (Pet. 23) on *United States* v. *Klaw*, 350 F.2d 155 (C.A. 2), in which the court reasoned that without some expert evidence showing prurient appeal of the materials to the average person or to a particular group, the jury was impermissibly left to its own subjective judgment. But the Second Circuit subsequently held that the *Klaw* requirement does not apply where, as here, the materials are hard-core pornography, even though it is claimed that the material is targeted at a particular group. *United States* v. *Wild*, 422 F.2d 34, 35-36. In the present case, moreover, the trial court on two occasions explicitly admonished the jury not to apply its own subjective standards in considering the materials (Tr. 930, 937).

In *Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 56, n. 6, the Court reserved judgment on the need for expert testimony in a case in which the "contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge * * * ." But with reference to the predominant themes of the material at issue here, a juror's experience is not so "plainly inadequate" as to overcome the fact that (*ibid.*):

> [Obscenity] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. * * * No such assistance is needed by jurors in obscenity cases; indeed, the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.

See *Hamling* v. *United States, supra*, 418 U.S. at 100; *Kaplan* v. *California*, 413 U.S. 115, 121.

4. Petitioner challenges (Pet. 24-26) certain evidentiary rulings of the trial court. He claims that he should have been allowed to submit evidence that he attempted in good faith to mail the materials to those who would not object to receiving them. Consent of the recipient is, however, irrelevant when the mailing is shown to be of obscene material, *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 68-69, and the good faith of petitioner's attempt to mail such material only to consenting recipients is likewise irrelevant under 18 U.S.C. 1461.

Petitioner also claims that he should have been allowed to present evidence concerning his good faith efforts to comply with 39 U.S.C. 3010 and 3011.[6] This claim is foreclosed by 39 U.S.C. 3011(e), which provides:

> Nothing in this section or in section 3010 shall be construed as amending, preempting, limiting, modifying, or otherwise in any way affecting section 1461 * * * of title 18 * * * .

Moreover, petitioner was convicted of mailing obscene material, rather than merely "sexually oriented advertisements," which is all that is treated in Sections 3010 and 3011. Petitioner's evidence of attempted compliance with those provisions is thus immaterial.

5. Petitioner also contends (Pet. 26-27) that the trial judge should have instructed the jury that the Florida obscenity statute had been held unconstitutional by a three-judge federal court prior to petitioner's mailings. See *Meyer* v. *Austin,* 319 F. Supp. 457 (M.D. Fla.), appeal dismissed, 413 U.S. 902. Petitioner, of course,

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[6]Section 3010 provides, in general, for the protection of those who have indicated that they do not wish to receive sexually oriented advertisements. Section 3011 provides for judicial enforcement of Section 3010.

was neither charged nor convicted under Florida law. As the Fifth Circuit said in *United States* v. *Hill*, 500 F.2d 733, 739, certiorari denied, 420 U.S. 952, in rejecting the same claim, the fact that the state statute had been held unconstitutional is not relevant to the issue whether petitioner violated the federal statute, since the judicial invalidation of the State's obscenity statute shed no light upon contemporary community standards. See *United States* v. *Danley*, 523 F.2d 369 (C.A. 9), certiorari denied, February 23, 1976 (No. 75-566).

6. Petitioner finally contends that 18 U.S.C. 1461 is unconstitutional (Pet. 27). Petitioner's claim that the statute was unconstitutionally vague on its face prior to *Miller* v. *California*, *supra*, was rejected in *Hamling* v. *United States*, *supra*, 418 U.S. at 99; see *United States* v. *Reidel*, 402 U.S. 351, 353-354; *Roth* v. *United States*, *supra*, 354 U.S. at 492. Petitioner's claim that the statute is unconstitutional because it subjects him to multivenue prosecutions is likewise insubstantial. As the court of appeals pointed out (Pet. App. 8), "[petitioner's] choice to do business throughout the nation limited his right to be tried in the locality where he lives and bases his operations." See *Hamling* v. *United States*, *supra*, 418 U.S. at 106.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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